

IN THE SUPREME COURT OF THE STATE OF MISSOURI

SC85824

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

In the Interest of:)	
)	
STATE OF MISSOURI)	
ex rel. N.H.L.,)	
)	
Relator,)	
)	
vs.)	SC85824
)	
)	
THE HONORABLE)	
TOM W. DEPRIEST, JR..)	
)	
Respondent.)	

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities	3-4
Standard for Issuing Writ of Prohibition.....	5-8
Relator’s Point(s) Relied On.....	8,10,11,12
Respondent’s Arguments in Opposition.....	9-16
Conclusion.....	16-17
Certification of Compliance.....	18
Certificate of Service.....	19
Respondent’s Appendix.....	20
Respondent’s Appendix Table of Contents.....	21
Respondent’s Appendix Contents.....	RA1-RA9

Reference Notes

All statutory references are to the Revised Statutes of Missouri, 2002. References to Relator’s Appendix are denoted as “A” and to Respondent’s Appendix as “RA”.

Table of Authorities

Cases

<i>Adoption of R.A.B. v. R.A.B.</i> , 562 S. W. 2d 356 (Mo. banc 1978).....	9,15
<i>City of Eureka v. Litz</i> , 658 S. W. 2d 519 (Mo. App. 1983).....	12
<i>Creamer v. Banholzer</i> , 694 S.W. 2d 497 (Mo. App. 1985).....	12
<i>H. W. S. v. C. T.</i> , 827 S. W. 2d 237 (Mo. App. 1992).....	13,15
<i>In re JK</i> , 661 N. W. 2d 216 (Mich. 2003).....	12
<i>In re Kerr et al v. Kerr</i> , 547 S. W. 2d 387 (Mo. App. 1977).....	10
<i>In the Interest of Baby Boy N.</i> , 874 P. 2d 680(Kan. App. 1994).....	13
<i>In the Interest of D.S.G.</i> , 947 S.W. 2d 516 (Mo. App. E.D. 1997).....	6,9,15
<i>Johnson v. Lester</i> , 71 S.W. 3d 240 (Mo. App. E.D. 2002).....	7
<i>Kobinski v. State, Welfare Div.</i> , 738 P. 2d 895 (Nev. 1987).....	12
<i>Meadowbrook Country Club v. Davis</i> , 384 S. W. 2d 611 (Mo. 1964).....	11
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	14,15
<i>State ex rel. Proctor v. Bryson</i> , 100 S. W. 3d 775 (Mo. 2003).....	5
<i>State ex rel. T. W. v. Ohmer</i> , SC085631.....	9,10

Statutes

Missouri Revised Statutes Section 211.447.....	9
Missouri Revised Statutes Section 453.005.1.....	15
Missouri Revised Statutes Section 453.010.1.....	6

Missouri Revised Statutes Section 453.011.3.....	8
Missouri Revised Statutes Section 453.040(7).....	9
Missouri Revised Statutes Section 453.080.1.....	9,13
Missouri Revised Statutes Section 453.140.....	10,11

Standards for Issuing a Writ of Prohibition

Relator incorrectly sets forth the standards for issuing a writ of prohibition pursuant

to the provisions set forth in *State ex rel. Proctor v. Bryson*, 100 S.W. 3d 775, 776 (Mo. banc 2003), by misstating the third basis. Relator states that the third circumstance is: “(3) where there is no adequate remedy by appeal.”(Brief of p.9). Respondent maintains that the correct third circumstance is: “(3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. Proctor v. Bryson* op. cit. at 776.

The Supreme Court of Missouri has jurisdiction to issue “the extraordinary remedy of a writ of prohibition ... in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. Proctor v. Bryson*, 100 S.W. 3d 775, 776 (Mo. banc. 2003).

1. No legal or actual irreparable harm would be suffered by Relator if relief is not made available in response to the trial court’s order.

The circumstances set forth above in (1) and (2) do not exist as a basis for jurisdiction to issue the requested writ of prohibition herein because Respondent clearly had jurisdiction to enter an order, judgment and decree of adoption pursuant to the provisions of Section 453.010.1. Relator concedes this point. (Brief of Relator p.9).

Therefore, the above-referenced misstatement by Relator is significant because circumstance “(3)” as correctly stated does not support the issuance of the requested writ

of prohibition. Relator, in an effort to avoid suffering irreparable harm, has available the relief of an appeal in response to the trial court's order finalizing the adoption. *In the Interest of D.S.G.*, 947 S.W. 2d 516, 518 (Mo. App. E.D. 1997)(RA6-RA9).

Relator's opportunity for relief herein from the Respondent's Judgment and Decree of Adoption, is in the form of a direct appeal of any or all findings in the trial court's order. Furthermore, Relator has taken advantage of that legal avenue by filing an appeal from the Judgment and Decree of Adoption entered by Respondent. (A48-A49). The fundamentals of due process for relief from an alleged unlawful or unfair order are available to Relator, who, in fact, is exercising her right in this regard. No legal irreparable harm therefore exists for Relator.

Nor does the entering of a final decree and judgment of adoption by Respondent create irreparable harm in fact to Relator or the minor child, because the minor child was already in the legal and physical custody of the Petitioners in the adoption proceeding. Pursuant to an order of the Family Court of St. Louis County on September 5, 2001, the Petitioners in the underlying adoption were granted legal and physical custody of the minor child by being appointed Guardians of the child. (A7). Relator received no rights of visitation or custody with the minor child in said order. The brief of Relator does not attempt to articulate specifically how the granting of a final judgment and decree of adoption by Respondent would cause her irreparable harm until Relator's appeal is concluded.

Because an order of legal guardianship was granted to Petitioners (A7-A9),

Respondent submits that no actual change in circumstances between Relator and the minor child would occur while Relator's appeal is pending from Respondent's final judgment and decree. If Respondent was prohibited from entering a final judgment and decree until Relator's appeal was concluded, this occurrence would not impact Relator's legal or actual right or opportunity to have contact with the minor child during this time period. Thus, the granting of the final order by Respondent would cause no actual irreparable harm to Relator.

2. The granting of a final Judgment and Decree of Adoption is a necessary prerequisite to allow Relator to pursue legal relief from Respondent's Order.

If Relator was successful in preventing Respondent from entering a final judgment and decree of adoption, Relator would not be able to proceed with her appeal of said order. It is a well established principal that in order for an appeal to lie there must be a final judgment that disposes of all issues in a case. *Johnson v. Lester*, 71 S.W. 3d 240 (Mo. App. E.D. 2002). Respondent submits that if Relator is successful in obtaining a Writ of Prohibition as requested, the Missouri Court of Appeals would be without jurisdiction to grant Relator relief from Respondent's order because it would not be a final judgment. The minor child's permanency relating to placement would be in legal limbo. This occurrence would be in direct opposition to the intent of the general assembly to expedite the permanency of the placement of a child who is the subject of an adoption proceeding. This would also be inconsistent with creating a legal avenue for all parties to receive relief from a trial court's ruling. Section 453.011.3.

Relator's Point Relied Upon

1. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding A.J.L.H. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator has an ongoing familial relationship with her child, guaranteed by Missouri Law and the Constitution of the United States, until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination. (Brief of Relator pp. 8,10).

Respondent's Argument in Opposition

Respondent disagrees with Relator's statement that "In adoption cases, two separate and distinct elements are necessary before a judgment can be entered; termination of parental rights and adoption of the child. (Brief of Relator p. 10). The provisions for finalizing an adoption are set forth in Section 453.080.1. Neither the consent to the adoption of a child by a parent, nor the termination of a parent's rights pursuant to a Chapter

211 proceeding, are necessary if one of the statutory provisions of Section 453.040 is established by clear, cogent and convincing evidence. (A13-A14). *Adoption of R.A.B. v. R.A.B.*, 562 S.W. 2d 356, 357 (Mo. banc 1978). Respondent found that the provisions of Section 453.040(7) existed by clear, cogent and convincing evidence. (A1-A2).

Relator directs the Court to consider its ruling in *State ex rel. T.W. v. Ohmer*, (SC856310) to support its position herein that Respondent abused his discretion and lacked the power to proceed with the adoption “of a child who has been the subject of a termination of parental rights while an appeal of the judgment terminating parental rights is pending.” (Brief of Relator at pp. 10-11). *State ex rel. T.W. v. Ohmer* involved two separate proceedings, a Chapter 211.447 involuntary termination, and subsequent to the judgment and order therein, a Chapter 453 adoption proceeding.

What distinguishes the case herein from the *State ex rel. T.W.* factual basis is that this case involves a single legal proceeding authorized under Chapter 453. *In the Interest of D.S.G.*, 947 S.W. 2d 516, 517 (Mo. App. E.D. 1997) held that “... when the petition is filed by a prospective parent, the termination issue and the adoption issue must proceed in tandem”. The compromise to the parent’s right to appellate review found in *State ex rel. T.W.* does not exist herein because the reviewing appellate court is presented in tandem both the termination of parental rights issue and the finalization of adoption issue.

Relator’s Additional Point Relied On

A. Relator has the right to a meaningful appeal of the termination of her parental rights and the adoption of her child.

1. Validity of decree not subject to attack for irregularities after expiration of one year. Section 453.140.

Respondent's Argument in Opposition

Relator states that Section 453.140 provides and intimates that after one year from the date of entry of a decree of adoption, the validity of that decree may not be attacked in any proceeding, for any reason, "even if found to be invalid by a reviewing Court." (Brief of Relator pp.11-12). Respondent suggests that the statute refers to a one year date from the entry of a decree of adoption for the filing of an authorized pleading to review said decree, not for actually determining the legal or equitable issues set forth in said pleading. *In re Kerr et al v. Kerr*, 547 S.W. 2d 387, 389 (Mo. App. 1977) sets forth the broad jurisdictional powers of the courts to vacate adoption decrees and sets forth as relevant in its consideration the filing of the pleading seeking review occurring over "one and a half years" following the entry of the decree.

Section 453.140 does not preclude a meaningful appeal for Relator herein who has already filed in a timely manner her request for review of the entry of decree of adoption in the appellate court.

Relator's Additional Point Relied On

2. Principles of Due Process requires that a trial court stay finalization of an adoption where the parent's appeal of that decision remains pending.

Respondent's Argument in Opposition

Relator has waived her right to assert any claims of violation of her constitutional rights because said claims were not raised until the filing of Relator's Motion to Stay Adoption filed after the judgment and decree of adoption was entered herein. (A5-A6).

It is clearly established in Missouri law that a constitutional issue is waived if not raised at the earliest possible time consistent with good pleading and orderly procedure under the circumstances of a given case. *Meadowbrook Country Club v. Davis*, 384 S.W. 2d 611, 612 (Mo. 1964). Additionally, Relator's constitutional claims are waived because the Motion to Stay Adoption pleading did not designate specifically the constitutional provision claimed to have been violated or the facts showing the violation as required by Missouri case law to preserve constitutional claims. *City of Eureka v. Litz*, 658 S.W. 2d 519, 521 (Mo. App. 1983) and *Creamer v. Banholzer*, 694 S.W. 2d 497, 499 (Mo. App. 1985).

Nonetheless, Respondent agrees that the finalization of the adoption process, as set forth in Chapter 453 of the Revised Statutes of Missouri, must proceed in compliance with the due process rights of all parties impacted by said proceeding. However, due process has been granted to, and is being granted to, Relator through both the trial and appellate proceedings respectively. Nothing in this portion of Relator's argument suggests or supports anything to the contrary.

Relator's Additional Point Relied On

3. A survey of recent precedent in Missouri and authority from other states militates that Relator's request to stay the adoption of her child while there is a review of her termination of her parental rights should have been granted.

Respondent's Argument in Opposition

Respondent has set forth above the basis for distinguishing *State ex rel. T.W. v. Ohmer* from the factual and legal basis herein. That same significant distinction exists in regard to the other states and cases cited by Relator. The Michigan case of *In re JK*, 661 N.W. 2d 216 (Mich. 2003)(A16-26), the Nevada case of *Kobinski v. State, Welfare Div.*, 738 P. 2d 895 (Nev. 1987)(A29-31), and the Kansas case of *In the Interest of Baby Boy N.*, 874 P. 2d 680 (Kan. App. 1994)(A32-41), all involved two separate proceedings in which the issues of termination of parental rights and finalization of adoption were being decided separately. The appellate court, in considering the termination of parental rights issue under a Missouri Chapter 453 proceeding, is not required to address a separate adoption proceeding as an effective condition to "reverse a termination".

Of notable significance is the fact that unlike the above-cited cases from other states, the appellate court herein is not faced with making a decision with the additional concern of having to remove the child from the prospective adoptive parents' custody. Section 453.080.1 requires the person to be adopted to be in the lawful and actual custody of the prospective adoptive parents for at least six months prior to finalization of an adoption. The adoptive parents herein had lawful and actual custody of the person sought to be adopted

since September 7, 2001, pursuant to the granting of Missouri Letters of Guardianship. (A7-A9). Unlike the above-referenced cases from other states cited by Relator, the existing order granting legal and physical custody to the prospective parents will not be impacted by the decision of the appellate court.

Missouri has long held that each adoption must be adjudged on its own unique set of facts. *H. W. S. v. C. T.*, 827 S.W. 2d 237, 239 (Mo. App. 1992). Thus, the impact of the appellate review on Respondent's order finalizing the adoption must be judged on the unique facts presented herein. The facts herein would not require a removal of the child from his current living situation as a result of any decision of the reviewing court.

Respondent's order finalizing the adoption, and his decision to deny Relator's Motion to Stay Adoption, does not and will not cause confusion and possible future harm to the minor child involved. As stated above, Respondent's acts do not impact the legal and physical custody of the minor child. Nor do Respondent's acts necessarily impact the emotional or psychological well being of the minor child. What and when the child is told about the legal proceedings and their specific legal ramifications as they relate to him, such as change of name, are decisions left to the discretion of the adoptive parents. Adoptive parents who have been informed of the legal "finality" of any trial court decision as it is subject to subsequent review, can control the imparting of legal information to the child as is appropriate and in the child's best interest. The relating of this information is an occurrence that is no different than many other discretionary decisions that those entrusted with the care and well being of a minor must make on a regular basis.

A parent initially does have the right to direct the destiny of their children, but it is certainly a right that can be lost. Through a proper due process consideration of the parent's care for a child, and that child's right to a permanent and stable environment, that parental right can be removed. The United States Supreme Court, in the case cited by Relator, *Santosky v. Kramer*, 455 U.S. 745, 769-770 (1982), affirms that a clear and convincing evidence standard "adequately conveys to the fact finder a level of subjective certainty about his factual conclusions necessary to satisfy due process" in proceedings in which a state seeks to completely and irrevocably sever the rights of parents to their natural child. A majority of the States have concluded that a "clear and convincing evidence standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." *Santosky* at 769.

Missouri courts have long recognized the "overarching principles that adoption statutes are strictly construed in favor of natural parents." *H. W. S. v. C. T.*, 827 S.W. 2d 237, 239 (Mo. App. 1992). However, the paramount concern is still the best interest of the child. *Adoption of R.A.B. v. R.A.B.*, 562 S.W. 2d 356, 357 (Mo. banc 1978). Relator's argument for the parent diminishes the equally valid right of the minor child in these proceedings. As set forth in *In the Interest of D.S.G.* 547 S.W. 2d.516, 517 (Mo. App.E.D. 1997):

The actions of termination of parental rights and adoption are statutory actions at law, they nevertheless involve equitable principles involving the very personal rights of natural parents, adoptive parents and most importantly, children. These equitable

concerns are acknowledged in the statutes governing the adoption process. The plain language of Section 453.005.1 mandates that ‘the provisions of sections 453.010 to 453.400 shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home.’

By providing for the consideration of rights of the natural parents, the best interests of the minor child, and the overall appropriateness of the finalization of an adoption in one legal proceeding, Chapter 453 acknowledges and protects the legitimate interests of all individuals impacted by the adoption process.

Conclusion

Respondent’s orders entering a decree of adoption and denying Relator’s Motion to Stay Adoption were not: an usurpation of judicial power without jurisdiction; an excess of jurisdiction or an abuse of discretion made without the power to act as intended; or judicial decisions that caused Relator to suffer irreparable harm because meaningful relief from Respondent’s orders was unavailable to Relator. Respondent did not abuse his discretion in proceeding with the adoption because this action did not compromise Relator’s right to appellate review. The appellate court in a single proceeding can review the issues of termination and the appropriateness of finalizing the adoption without concern about impacting either the current legal or physical custody of the minor child.

No legal basis exists to grant the extraordinary remedy of a writ of prohibition and Relator’s request should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Comes now counsel for Respondent and certifies that:

1. The brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, that the claims are warranted by existing law, and the allegations are supported by evidentiary support;
2. The brief complies with Rule 84.06(b);
3. The number of words contained in the brief is approximately 3,197 as listed by the word processor the document was prepared on;
4. The disk has been scanned for viruses and it is virus free.

William P. Grant

CERTIFICATE OF SERVICE

This is to certify that Respondent's Brief and Respondent's Appendix, ten copies of each, and one (1) floppy disk containing Respondent's Brief were sent via Federal Express overnight mail to the Supreme Court of Missouri on May 5th, 2004.

One copy of Respondent's Brief, two copies of Respondent's Appendix and one floppy disk containing Respondent's Brief was hand delivered this 5th day of May, 2004, to: Ms. Kathleen C. DuBois, Attorney for Relator, and the Honorable Tom W. DePriest Jr., both at 501 S. Brentwood Blvd., Clayton, Missouri 63105, and mailed by regular U.S. mail to: Ms. Kim Rensing, Attorney at Law and Guardian ad Litem, 758 Chamberlin Place, Suite 102, St. Louis, Missouri 63119, and Mr. Mark Hunyar, Father of the minor child, 2107 S. Grand, Apt. 315, St. Louis, Missouri, 63110, this 5th day of May, 2004.

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RESPONDENT’S APPENDIX

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TABLE OF CONTENTS

RESPONDENT'S APPENDIX

Statutes

Missouri Revised Statutes Section 453.005	RA1
Missouri Revised Statutes Section 453.010	RA2-3
Missouri Revised Statutes Section 453.080.1	RA4-5

Cases

In the Interest of D.S.G., 947 S.W. 2d 516	RA6-RA9
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